United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1507

To be argued by
MAURICE EDELBAUM
FREDERICK C. RITGER, JR.
ROBERT EISENBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1507

UNITED STATES OF AMERICA,

Appellant,

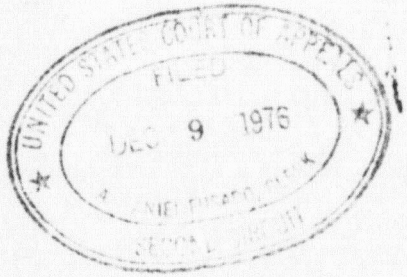
—v.—

ANTHONY PROVENZANO, SALVATORE BRIGUGLIO, HAROLD KONIGSBERG, and GEORGE VANGELAKOS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN BEHALF OF APPELLEES PROVENZANO, BRIGUGLIO, and VANGELAKOS



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ANTHONY PROVENZANO, SALVATORE BRIGUGLIO, HAROLD KONIGSBERG, and GEORGE VANGELAKOS,

Defendants-Appellees.

BRIEF IN BEHALF OF APPELLEES PROVENZANO, BRIGUGLIO, and VANGELAKOS

Questions Presented for Review

The indictment, which was filed in 1976, alleged a violation of 18 U.S.C. § 1201, commonly referred to as the Federal Kidnapping Statute. The violation was alleged to have occurred in 1961. At that time, violation of the statute, under circumstances such as those alleged by the indictment, wa punishable by death, ". . . if the jury shall so recommend." 18 U.S.C. § 1201(a)(1).

Since the alleged violation was punishable by death, an indictment predicated upon that violation could be "found at any time without limitation", pursuant to the provisions of 18 U.S.C. § 3281.

In 1968, the Supreme Court held that the death penalty provision of the kidnapping statute was uncon-

stitutional, and, therefore, void, but severable from the remainder of the statute.

In 1972, Congress enacted an amended kidnapping statute, which included the elimination of the death penalty provision. No specific savings clause was enacted with respect to prosecutions maintainable under the pre-amendment version of the kidnapping statute. Similarly, no special statute of limitations was enacted with respect to either version of the kidnapping statute. Kidnapping prosecutions under the amended statute thus became subject to the five year period of limitations of 18 U.S.C. § 3282.

The indictment in the present case was returned more than fourteen years after the alleged kidnapping. The District Court held that the five year period is now applicable to the pre-amendment version of the statute, and dismissed the indictment as time barred.

The questions presented for review are:

1. Did the District Court correctly hold that the indictment was time barred since the combined effect of the 1972 amendment and the 1968 voiding of the death penalty provision, placed the former "capital crime" categorization of the kidnapping statute beyond the reach of the general savings clause (1 U.S.C. § 109), thus causing the pre-amendment violations to be non-capital offenses and subject to the five year statute of limitations?

2. Notwithstanding the District Court's analysis, was the prosecution herein time barred by virtue of the 1968 voiding of the death penalty provision since, from that point on, kidnapping was not "punishable by death" and, thus, did not meet the sole criterion essential for unlimited prosecutions, as clearly specified in 18 U.S.C. § 3281?

Statement of the Case

On June 22, 1976, a two count indictment was filed in the Southern District of New York (A. 15-21). It charged that, between January 1, 1961 and June 6, 1961, the appellees conspired to violate the then-existing provisions of 18 U.S.C. § 1201 (Count I) and that they did, in fact, commit the substantive offense prohibited by that statute (Count II), to wit: the luring of one Anthony Castellito across state lines (New Jersey to New York) for the purpose of doing harm to him.

On October 29, 1976, the Honorable Charles E. Stewart, Jr., United States District Judge, granted a defense motion for a dismissal of the indictment upon the ground that the charges were barred by the statute of limitations. Judge Stewart's memorandum order is set forth at A. 72-86.

The government appeals from the order dismissing the indictment.

ARGUMENT

POINT I

The District Court properly concluded that the indictment was time barred by virtue of the combined effect of the unconstitutionality of the death penalty and the subsequent Congressional amendment of the kidnapping statute.

We fully endorse that portion of Judge Stewart's opinion which concludes that the instant prosecution is barred by the statute of limitations (A. 79-86). Since no useful purpose would be served by repeating Judge Stewart's detailed analysis of the applicable authorities,

we respectfully refer this Court to that portion of his opinion. However, it is appropriate that we address ourselves to certain of the government's arguments with respect to Judge Stewart's opinion.

A. The government's fallacious strawman analogy.

The government has characterized the District Court's opinion as an example of "utter illogic" (Gov. Br., at p. 12). In fact, the government's effort to demonstrate its rather bold assertion is, itself, incomprehensible.

The government admits, as it must, that the death penalty provision of 18 U.S.C. § 1201 [hereinafter, "The Kidnapping Statute"] has no force and effect *as a penalty*, since it was declared unconstitutional in *United States* v. *Jackson*, 390 U.S. 570 (1968) (Gov. Br., at p. 7 fn. 1). The government argues, however, that the death penalty provision, nevertheless, retained sufficient vitality to continue to draw to the kidnapping statute a variety of procedural statutes, including 18 U.S.C. § 3281, which are applicable to prosecutions in which the death penalty may be imposed (Gov. Br., at pp. 10-13).

In rejecting the government's argument, the District Court reasoned as follows: the procedural statutes applicable to "capital cases" *may* * survive the Constitutional nullification of a death penalty provision since Congress's classification of offenses as "capital offenses" was more likely predicated upon the serious nature of the offense than upon the extreme nature of the penalty which can be imposed for commission of the offense. However, when, subsequent to *Jackson*, Congress repealed the death penalty provision of the kidnapping statute, it removed

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* See fn. 4 at p. 10, *infra*. We disagree with the District Court's allowance of that possibility.

the only manifestation of Congressional will that the procedural statutes in question be applicable to kidnapping prosecutions. No contemporaneous, or even subsequent, effort was made by Congress to limit that reclassification or to broaden the applicability of any of the procedural statutes. The general savings clause, 1 U.S.C. § 109, will normally operate to preserve the pre-existing substantive features, including penalty provisions, of an amended or repealed statute. However, in view of the unconstitutionality of the death penalty provision of the kidnapping statute, that provision no longer operated as a penalty, but only as a procedural device which called into play the corresponding procedural statutes applicable to "capital cases". Since the general savings clause does not save procedural devices, the repeal of the death penalty provision had the effect of repealing the procedural devices which were attendant upon it.

The District Court's analysis is squarely supported by the Fourth Circuit's decision in *United States* v. *Watson*, 496 F.2d 1125 (4th Cir., 1973), to which the government does not bother to make any reference in its brief. Instead, the government cites no authority, but rather, relies upon a "hypothetical example". It argues that if the 1972 amendment of the statute had consisted of a procedurally Constitutional death penalty provision then, under the District Court's reasoning, the former kidnapping statute would nevertheless be relegated to a five year statute of limitations (Gov. Br., at pp. 11-12). The government's argument misstates and misapplies the reasoning and holding of the District Court. The District Court clearly pinned its rationale upon Congressional categorization. If Congress had continued to categorize kidnapping as a death penalty crime, then the District Court would have had a different issue before it. Since the Court did not have to reach that issue, it did not

decide it. Its opinion suggests, however, that it "might be inclined" to decide the government's hypothetical situation in favor of the continuing applicability of the unlimited statute of limitations (A. 79; see also fn. 4, at p. 10, *infra*).

B. The government's Congressional oversight argument.

In a footnote, at page 13 of its brief, the government argues that the defendants (and, presumably, the District Court):

> "failed to recognize, however, that it is doubtful whether the 1972 Congress . . . realized that the effect of its 'stopgap' measure of eliminating the death penalty would take kidnapping-murder out of the scope of the unlimited statute of limitations.[1]
>
> "Moreover, it may well be that before the five year statute of limitations expires in October, 1977, Congress will . . . extend the statute of limitations for these post-amendment offenses." (Gov. Br., fn. at p. 13).

The obvious answer to the government's speculation is found in *United States* v. *Jackson*, *supra*, 390 U.S. at 573:

> " * * * It is unnecessary to decide here whether this conclusion would follow from the statutory scheme the government envisions, for it is not in fact the scheme that Congress enacted."

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[1] Throughout its brief, the government refers to "kidnapping-murder". This is an all too obvious appeal to passion and emotion. The death penalty provisions of the kidnapping statute are applicable whenever some harm, whether fatal or not, befalls the victim. *See also*: our discussion, infra, pp. 21-22, concerning the pending New York State murder indictment, which is predicated upon the same facts.

C. The government's argument based on penalty cases.

In its attempt to breathe life into its argument, the government relies upon several judicial applications of the general savings clause which had nothing to do with the continued vitality of statutes of limitations (*See*: authorities cited in Gov. Br., at pp. 9-10). Thus, in *United States* v. *Reisinger*, 128 U.S. 398 (1888), the issue was whether repeal, despite a general savings clause, extinguished a criminal statute so as to preclude subsequent prosecution for acts committed prior to the repeal. No issue was presented concerning the statute of limitations. In *Warden* v. *Marrero*, 417 U.S. 653 (1974), the question was whether a person who was prosecuted, convicted and sentenced under a drug abuse statute which contained several parole eligibility restrictions, was entitled to the more lenient parole provisions of 18 U.S.C. § 4202. The Court held that both the special savings clause that was enacted at the time of the repeal of the prior drug abuse law, and the general savings clause, operated to retain the strict parole provisions with respect to pre-repeal criminal conduct. This was so because parole eligibility "is part of the 'prosecution' saved by the special saving clause" (417 U.S. at 658), and also because restrictive parole eligibility is a 'penalty' within the meaning of the general saving clause." (417 U.S. at 658-664). The other authorities cited by the government are of a similar nature.

D. The government's deterrent argument.

The government next argues that 18 U.S.C. § 3281, being an "unlimited statute of limitations is in no sense a 'procedural device.'" (Gov. Br., at p. 15). Instead, the government urges, it is a "liability" since it "is plainly

meant as a deterrent to potential offenders" (Gov. Br., at p. 16). The government's argument will not wash, and is not supported by the only authority which it cites, *State* v. *Zarinsky*, 143 N.J. Super. 35, 51 (App. Div., 1976). (*Zarinsky* is reproduced in the government's appendix at A. 87-112). It expresses precisely the same categorization rationale indicated in the District Court's memorandum opinion herein. *Zarinsky* does not hold that the unlimited statute of limitations is substantive rather than procedural. More importantly, *Zarinsky* did not involve an intervening legislative repeal of the death penalty provision. To the contrary, the *Zarinsky* court noted: "The unenforceability of the death penalty has not wiped the statute off the books." (A. 102). In the present case, the death penalty provision has been "wiped off the books" by Congressional amendment.[2]

The unlimited statute of limitations is clearly procedural. Indeed, the government fails to realize its own argument to that effect in the footnote at page 13 of its brief. It there argues that Congress can, until October, 1977, replace the existing five year statute of limitations with an unlimited period of limitations applicable to all kidnapping offenses which have occurred since 1972. Congress would certainly be foreclosed from doing so if such a change was substantive rather than procedural.

Moreover, nothing in the legislative history of § 3281 indicates that Congress enacted it as a penal or deterrent device.

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[2] We are advised that the Supreme Court of New Jersey has granted the defendant-appellant leave to appeal to that Court from the adverse decision of the Appellate Division.

E. The government's incorporation argument.

The government's final argument is that since the unlimited statute of limitations is applicable to only "a very limited number of most serious offenses" there is some sort of a unique melding of those offenses and the statute which causes a continued applicability of the statute to the offenses, despite the considerations already discussed. (Gov. Br., at p. 16). The government suggests that its gets some support for this rather outlandish argument from this Court's opinion in *United States* v. *Obermeier*, 186 F.2d 243, 254 (2d Cir., 1950). An examination of that opinion, however, reveals that the "unusual instances" in which such an analysis might be applicable are ones where "no criminal liability is involved" (Id.). Moreover, as the government concedes, the unlimited statute of limitations was not contained in the kidnapping act itself.[3]

The government's argument should be rejected for what it is—frivolous.

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[3] In an effort to demonstrate that the death penalty, and therefore, the unlimited statute of limitations, is applicable only to "a highly selective group of most serious offenses", the government notes ten such offenses in the second footnote at page 16 of its brief. The list does not purport to be exhaustive and the government has made no effort to indicate how many death penalty provisions, long since repealed, would be revived by an application of its theory.

POINT II

Apart from the amendment of the kidnapping statute, the unconstitutionality of the death penalty provision, in and of itself, rendered the crime not punishable by death, and therefore subject to the five year statute of limitations.

In its opinion, the District Court indicated that the death penalty provision of the kidnapping statute serves the dual function of: (1) prescribing the penalty, and (2) categorizing the offense for the purpose of providing a standard for the applicability of various procedural statutes, including the statute of limitations. The Court then suggested, but did not hold, that *United States* v. *Jackson*, 390 U.S. 570 (1968), in declaring the death penalty provision unconstitutional, may not have nullified the categorization function.[4]

We respectfully differ with the District Court's suggestion, and we submit that the categorization theory does not withstand analysis. As we shall demonstrate, there was no need for the District Court to go beyond *Jackson* in order to find that the instant prosecution was barred.

A. The literal wording of 18 U.S.C. § 3281.

The statute of limitations for offenses punishable by death is contained in 18 U.S.C. § 3281, which provides as follows:

> "*Capital offenses.*—an indictment *for any offense punishable by death* may be found at any

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[4] As the District Court put it: "We *might be inclined*, therefore, were *Jackson* the only pertinent event to hold that it did not transform § 1201 into a non-capital offense for the purposes of the applicability of § 3281, and to rule that the prosecution here would be timely." [Emphasis added] (A. 79).

time without limitation except for offenses barred by the provisions of the laws existing on August 4, 1939." (June 25, 1948, C. 645, § 1, 62 Stat. 827). [Emphasis added]

The indictment herein was returned more than fifteen years after the alleged occurrence of the crime charged. The plain wording of the statute is that if the crime charged is not "punishable by death", then the statute of limitations has long since expired.

In *United States* v. *Jackson, supra*, the Supreme Court declared unconstitutional the capital punishment provision of the Federal kidnapping statute. That provision of the statute is, therefore, null and void and of no effect.

Since a violation of the Federal kidnapping statute could not Constitutionally be punishable by death, the five year statute of limitations applicable to offenses not punishable by death (18 U.S.C. § 3282), is clearly applicable to the present case.

In accepting the categorization argument, the District Court stated: "Thus we agree with the government that the term "capital offense" was used in § 3281 as a short hand reference to a category of offenses of a particularly serious nature." The Court obviously overlooked the fact that the term "capital offenses" is not used "in" § 3281. It is merely the section title. The unambiguous operative words of the statute, itself, are "any offense punishable by death".[5]

In *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, at 528-29 (1947), the Supreme

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[5] Compare the New York statute of limitations discussed, infra, at fn. 9, pp. 21-22.

Court made clear that in circumstances such as those presented here, the plain meaning of the statutory text is controlling:

> "[H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have lead to the wise rule that the title of a statute *and the heading of a section cannot limit the plain meaning of the text* [*citations omitted*]. *For interpretive purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.*" [Emphasis added]

See also: *United States* v. *Roemer*, 514 F. 2d 1377, 1380 (2d Cir., 1975).

It would be difficult to imagine a more unambiguous text than that presented by § 3281.

B. The legislative history of 18 U.S.C. § 3281.

The instant unlimited statute of limitations was first enacted on August 4, 1939, 18 U.S.C. §§ 581(a), 581(b) (1940 Ed.; August 4, 1939, C. 419, §§ 1, 2, 53 Stat. 1198). Nothing in the legislatve history indicates that it was intended to apply to any offense other than an offense

for which the death penalty could be imposed. (Senate Report No. 215 dated March 27, 1939 and House Report No. 1337 dated July 27, 1939).[6] An examination of the statute, as enacted, section headings and all, can leave no doubt that the sole factor determinative of the applicability of the statute was whether the offense was "punishable by death". It is reproduced in 1940 U.S. Code Congressional Service, at p. 1290, as follows:

> "*Offenses punishable by death—no statute of limitations to apply.*
>
> "Chapter 419—First Session.
>
> "[Public-No. 261-76th Congress].
>
> "[S 1773]
>
> "An act to provide that no statute of limitations shall apply to offenses punishable by death.
>
> "Be it enacted by Representatives of the United States of America in Congress assembled, That:
>
> "An indictment for any offense punishable by death may be found at any time without regard to any statute of limitations.
>
> "SEC. 2. This Act shall not authorize prosecution, trial, or punishment for any offense now barred by the provisions of existing law.
>
> "Approved, August 4, 1939."

Notably, there is no reference to the concept of "capital offense".

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[6] As indicated by the District Court (A. 78), the legislative reports offer one explanatory statement—a letter from the then-Attorney General. The letter stated, *inter alia*: "I therefore recommend that, as to any offense for which the death penalty may be imposed, no statute of limitations shall apply . . ."

When the criminal code was revised in 1948, the above noted statute was recodified as 18 U.S.C. § 3281. The Reviser's Note states that the former provision was merely "consolidated into this section without change of substance."

There is, therefore, nothing in the legislative history of § 3281 which indicates the Congressional intent to have the statute apply to any criminal conduct other than that specified in its unambiguous text, i.e., "offenses punishable by death". The fact that those who created section headings for the new Code classified the statute under the title "Capital offenses", is indicative of nothing other than a desire for a convenient point of reference.

C. The historical and generally accepted meaning of "capital punishment".

The authorities are uniform in defining a "capital case" or a "capital crime" or a "capital offense", as being one which is "punishable by death."[7]

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[7] *State* v. *Charles*, 469 P. 2d 792, 793 3 Ore. App. 172 (1970); *Commonwealth* v. *Myers*, 252 N.E. 2d 350, 352, 356 Mass. 343 (1969); *Commonwealth* v. *Warfield*, 227 A. 2d 177, 181, 424 Penn. 555 (1967); *Chaney* v. *State*, 56 So. 2d 385, 387, 36 Ala. App. 374 (1952); *State* v. *Christensen*, 195 P. 2d 592, 596, 165 Kan. 585 (1948); *Lee* v. *State*, 13 So. 2d 583, 587, 34 Ala. App. 91 (1943); *Commonwealth ex rel. Alberti* v. *Boyle*, 195 A. 2d 97, 98, 412 Penn. 398 (1963); *Ex Parte Welsh*, 162 S.W. 2d 358, 359, 236 Mo. App. 1129 (1942); *Ex Parte Berman*, 87 N.E. 2d 716, 718, 86 Ohio App. 411 (1949); *Ex Parte Berry*, 88 P. 2d 427, 428, 198 Wash. 317 (1939); *State* v. *Williams*, 152 A. 2d 9, 19, 30 N.J. 105 (1959); *Allison* v. *State*, 164 S.W. 2d 442, 443, 204 Ark. 609 (1942); *State* v. *Doucet*, 147 So. 500, 501, 177 La. 63, 87 ALR 1356 (1933).

See also: the following cases where it was held that a pretrial declaration, by the prosecution or by the Court, that the death

[Footnote continued on following page]

In *State* v. *Clark*, 197 S.E. 2d 605, 607, 18 N.Ca. App. 621 (1973), the Court held that the case ceased to be a "capital case" with regard to the number of allowable challenges, when the Court announced at the outset of the proceedings that under no circumstances would the death penalty be imposed.

In *Ex Parte Wilson*, 114 U.S. 417 (1885), the Supreme Court was called upon to construe the Fifth Amendment requirement that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .".

In doing so, the Court recounted the historical significance of those phrases:

> "* * * By the law of England, informations by the Attorney General, without the intervention of a grand jury, were not allowed for capital crimes, nor for any felony, by which was understood any offense which at common law occasioned a total forfeiture of the offender's lands or goods, or both. 4 B.L. Comm. 94, 95, 310. *The question whether the prosecution must be by indictment, or might be by information, thus depended upon the consequences to the convict himself.* The Fifth Amendment, declaring in what cases a grand jury should be necessary, and, in effect, affirming the rule of

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penalty would not be sought or imposed, eliminated the applicability of procedural protections attendant upon "capital cases": *People* v. *Holmes*, 313 N.E. 2d 297, 300, 19 Ill. App. 3d 814 (1974); *State* v. *Clark*, 197 S.E. 2d 605, 607, 18 N.Ca. App. 621 (1973).

Indeed, Judge Bonsal, who was originally assigned to try the instant case denied such procedural benefits to the co-defendant Konigsberg (A. 81, fn. 3).

> the common law upon the same subject, substituting only, for capital crimes or felonies, 'a capital or otherwise infamous crime,' manifestly had in view that rule of the common law, rather than the rule on the very different question of the competency of witnesses. *The leading word 'capital' described the crime by its punishment only,* the associated words 'or otherwise infamous crime' must, by an elementary rule of construction, includes crimes subject to any infamous punishment, even if they should be held to include also crimes infamous in their nature, independently of the punishment affixed to them." (114 U.S. at 423-424). [Emphasis added]

In short, historically, the meaning of "capital crime" was precisely what the phrase suggests—a crime punishable by death. In the present case, Federal kidnapping violations stopped being punishable by death with the Supreme Court's 1968 decision in *Jackson.* Indeed, the government's brief appears to concede that this was precisely the case in 1961, when the crime was allegedly committed in the instant case:

> "* * * At that time [1961], a violation of the Federal Kidnapping Act, 18 U.S.C. § 1201, was punishable by death *and therefore was considered a 'capital offense.'* Gov. Br., at p. 3)." [Emphasis added].

D. Current case law in view of the *Jackson* decision.

In *United States* v. *McNally,* 485 F. 2d 398 (8th Cir., 1973), cert den., 415 U.S. 978, where a defendant was prosecuted for air piracy (49 U.S.C. § 1-72[i]), under a statute substantially analogous to that applicable to the present case, the Court ruled that since imposition of the

death penalty would have been unconstitutional in that case, the capital crime allowance of twenty peremptory challenges for the defense was not applicable (485 F. 2d at 407).

In *Reed* v. *United States*, 432 F. 2d 205 9th Cir., 1970), the Court held that since the capital punishment provision of the Federal kidnapping statute had been declared unconstitutional, the defendant had properly been deprived of the variety of procedural advantages which accrue to defendants in capital cases. Thus, the defendant had no right to twenty peremptory challenges, a list of veriremen and witnesses, etc. Significantly, Reed committed the offense in January, 1965, and was tried in July, 1965, several years prior to the *Jackson* declaration that the capital punishment provision of the statute was unconstitutional. However, the Court of Appeals held that *Jackson* was fully retroactive for all purposes, and even though Reed had been tried as though his case were a capital case, "Reed was never faced with a capital charge." (432 F. 2d at 208).

A variety of State decisions have held that the unconstitutionality of death penalty provisions rendered prosecutions to be non-capital cases, thus depriving defendants of procedural advantages which would otherwise be applicable:

No additional peremptory challenges: *People* v. *Watkins*, 17 Ill. App. 3rd 574, 308 N.E. 2d 180 (1974); *Martin* v. *State* (Ind.), 314 N.E. 2d 60 (1974), *cert. den.* 420 U.S. 911; *Jenkins* v. *State* (Tenn.), 509 S.W. 2d 240 (1974); *State* v. *Hagga*, 13 Wash. App. 630, 536 P. 2d 648 (1975).

Deprivation of right to a separate trial, previously available in capital cases: *Vault* v. *Adkisson*, 254 Ark.

75, 491 S.W. 2d 609 (1973); *Baumgarner* v. *Hall* (Ark.), 506 S.W. 2d 834 (1972); *Donaldson* v. *Sack* (Fla.), 265 So. 2d 499 (1972).

Similarly, a number of Courts have held that, where capital offenses were non-bailable, the declaration that a capital punishment provision is unconstitutional renders it necessary that a defendant charged with such an offense be admitted to bail: *Ex Parte Contella* (Tex. Crim.), 485 S.W. 2d 910 (1972); *State* v. *Johnson*, 61 N.J. 351, 294 A. 2d 245 (1972); *Commonwealth* v. *Truesdale*, 449 Pa. 325, 296 A. 2d 829 (1972); *Re Tarr*, 109 Ariz. 264, 408 P. 2d 728 (1973); *Baumgarner* v. *Hall*, *supra.*; *Edinger* v. *Metzger*, 32 Ohio App. 2d 263, 290 N.E. 2d 577 (1972); *State* v. *Aillon* (Conn.), 295 A. 2d 666 (1972); *State* v. *Pett*, 92 N.W. 2d 205, 206, 253 Minn. 429 (1958).

Any doubt that would appear to exist with respect to the correctness of our analysis is eliminated by the opinion of Judge Learned Hand in *United States* v. *Parrino*, 180 F. 2d 613 (2d Cir., 1950). In that case, which was a prosecution under the Federal kidnapping statute, the indictment was returned fourteen (14) years after the alleged crime. Judge Hand described the underlying facts as follows:

> "* * * Rosen, the man kidnapped, had been released soon after the first indictment was found; but the only information in the present record about his condition at the time of his release is that a jury might have found that he was released harmed within the meaning of the statute. In charging the jury the judge said that, if they found that the kidnapped person had not been 'liberated unharmed,' they were to declare whether they recommended the death penalty. The jury returned a verdict of guilty upon both counts without recommending the death penalty, and the judge

imposed a sentence of twenty-five years." (180 F. 2d at 614).

In arguing that the indictment was timely filed, the government in *Parrino* submitted, "That the indictment was for an 'offense punishable by death' and might therefore be 'found at any time' without regard to the three year statute." (180 F. 2d at 614-615). In rejecting that rationale, Judge Hand held as follows:

> "* * * The statute, when it wiped out all limitation by the words, 'punishable by death,' did not make the character of the crime the test, but the penalty that could be imposed upon it; and in the case of kidnapping the jury does not get the power to impose the death penalty unless the victim has not been released at all, or has been released 'harmed.' When a crime is made 'punishable' by a prescribed penalty—fine, forfeiture, imprisonment, death, or anything else—the choice of the kind and character of the sentence is confided to some authority in its discretion; *and it does not become 'punishable' by that authority until all the conditions imposed upon the exercise of its discretion have been satisfied.* * * *" (180 F. 2d at 614-615)

To the same effect, *see*: *Askins* v. *United States*, 251 F. 2d 909 (D.C. Cir., 1948).

In the present case, the five year period of limitations is applicable unless the defendants are charged with a crime "punishable by death". It is clear that the defendants are not charged with a crime "punishable by death", and that the statute of limitations has long since expired.

It is also worth noting that *United States* v. *Watson*, 496 F.2d 1125 (4th Cir., 1973), which continued to apply

the two attorney rule, despite the striking of the death penalty, does not in any way detract from our contention. To the contrary, the Court there ruled in favor of the defendant out of an excess of caution: "... We regard our role as one of proceeding with caution unless and until it unmistakeably appears that *Furman* has had this effect [of eliminating procedural statutes applicable to capital punishment cases].'" (496 F.2d at 1129).[8]

E. The rules of construction favor the finding that the indictment was barred

The Supreme Court has held, and has repeatedly reiterated, the proposition that criminal limitations statutes are "to be liberally interpreted in favor of repose", i.e., in favor of the defendant. *United States* v. *Sharton*, 385 U.S. 518, 522 (1932); *Toussie* v. *United States*, 397 U.S. 112, 115 (1970); *United States* v. *Marion*, 404 U.S. 307, 322, fn. 14 (1971). To the extent that there would otherwise be any hestitation in applying the five year period of limitations provided in 18 U.S.C. § 3282, rather than the absence of limitations provided by 18 U.S.C. § 3281, the above noted policy certainly requires the application of the limited period.

Similarly, to the extent that the criminal statutes here in issue present a choice of interpretation, this Court should follow the general rule favoring construction of ambiguous statutes in favor of criminal defendants, *United States* v. *Bass*, 404 U.S. 336 (1971); *United States* v. *Obermeier*, 186 F.2d 243, at 256, fn. 59 (2d Cir., 1950).

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[8] The Fourth Circuit later held, in *United States* v. *Massingale*, 500 F. 2d 1224 (4th Cir., 1974), that the 1972 repeal of the death penalty provision, when combined with the 1968 *Jackson* decision, require the conclusion that the capital punishment procedural statutes were no longer applicable.

Our argument in this regard is buttressed by the opening paragraph by Congress' most recent declaration of policy with respect to the kidnapping statute, and by the existence of a corresponding New York State murder indictment in the present case.

> *"Statement of Findings and Declaration of Policy*
>
> "The Congress recognizes that from the beginning of our history as a nation, the police power to investigate, prosecute, and punish common crimes such as murder, kidnapping, and assault has resided in the several States, and that such power should remain with the States." (1972 *U.S. Code Cong. and Admin. News*, at p. 1255).

In the present case, the defendants Provenzano, Briguglio and Konigsberg are the subjects of a pending New York State indictment, based on the same facts, which was filed contemporaneously with the indictment herein.[9]

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[9] The State statute of limitations is not geared to the punishment which may be imposed, as is the Federal statute, but rather to the character of the crime charged. The former Code of Criminal Procedure, §§141 and 141-a, provided:

> §*141*:
>
> "There is no limitation of time within which a prosecution for murder must be commenced. It may be commenced at any time after the death of the person killed."
>
> §141-a:
>
> "There is no limitation of time within which a prosecution for kidnapping hereafter committed must be commenced. It may be commenced at any time after the commission of the crime."

Similarly, §30.10(2)(a) of the present New York Criminal Procedure Law provides:

> "A prosecution for a class A felony may be commenced at any time."

[Footnote continued on following page]

Thus, any reluctance which might otherwise accompany the dismissal of the instant indictment, should be eliminated by the existence of the State indictment and the congressional statement of policy.

CONCLUSION

For all of the above reasons, this Court should affirm the order of the District Court which dismissed the indictment herein upon the ground that it was barred by the statute of limitations.

Respectfully submitted,

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December, 1976

[Footnote continued from prior page]

§§141 and 141-a of the former Code of Criminal Procedure were, respectively, enacted in 1881 (L. 1881, Ch. 442, §141) and 1935 (L. 1935, Ch. 708, §141-a). If Congress had wished to adopt the categorization concept, rather than the penalty concept, it certainly had the opportunity to do so, since the antecedent statute of present 18 U.S.C. 3281, was not enacted until 1939.

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